No. 92-1625

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, and
UNITED MINE WORKERS OF AMERICA, DISTRICT 28,
Petitioners,

v.

JOHN L. BAGWELL, CLINCHFIELD COAL CO.,
and SEA "B" MINING CO.,
Respondents.

On Writ of Certiorari to the Supreme Court of Virginia

REPLY BRIEF FOR PETITIONERS

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A. *The Mandatory/Prohibitory Dichotomy.* The starting point for analysis—and the one point of agreement between the parties—is that there is a class of contempt proceedings ("criminal contempt") in which constitutional criminal due process requirements govern and there is a class of such proceedings ("civil contempt") in which those requirements do not govern. *See Hicks v. Feiock*, 485 U.S. 624, 631-35 (1988) (citing cases).

In shorthand terms, it is our submission that the class of criminal contempt includes all contempt proceedings growing out of a private civil case in which a substantial, determinate, noncompensatory fine payable to the court (or the state) is assessed on the finding that the defendant has violated a *prohibition* in the underlying order. And, it is the submission on the other side that criminal contempt covers only those situations in which such a contempt fine is "unscheduled," and that the inclusion in the underlying court order of a "prospective schedule of fines for future violations" places all ensuing contempt proceedings on the civil contempt side of the line. Resp. Br. 14-15.

The briefs on the other side charge us with proposing a "mechanical rule"—a "talismanic" test—that looks not to the "character of the relief itself but to the phrasing of the underlying injunction," and treat our submission in this oversimplified fashion throughout. Resp. Br. 18. These epithets more properly describe their theory of the case. But response to this mischaracterization requires review of what we have previously shown regarding this Court's contempt jurisprudence, the long lines of legal history, and the interests and values expressed by the Constitution's criminal due process provisions. As we now show, all these factors have led this Court, in the particular context of contempt, to the mandatory/prohibitory dichotomy. None lead to the "scheduled" penalty/"unscheduled" penalty dichotomy.

1. a. The well-settled law is that the Constitution guarantees to a defendant, faced with the prospect of

criminal contempt sanctions for the violation of a court order, the procedural protections required generally in criminal proceedings. That law rests on two bases.

First, "the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates"; that being so "[c]riminal contempt is a crime in the ordinary sense" and "in every fundamental respect." *Bloom v. Illinois*, 391 U.S. 194, 202 (1968).

Second, this Court has emphasized that the criminal contempt context presents an additional and "even more compelling argument . . . for providing" a defendant with constitutional criminal procedure protections. *Bloom*, 391 U.S. at 202. A charge of "[c]ontemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament." *Id.* In this highly charged context, the Constitution's criminal procedures are essential "protection[s] against the arbitrary exercise of . . . [a] summary power . . . which is liable to abuse." *Id.* (internal quotations omitted).[1]

b. At the same time, traditional equity practice afforded a party injured by another party's disobedience to an equity order in the first party's favor redress through an ancillary equity proceeding carried on as part of the basic case. *See* Pet. Br. 16-17 n.5, 29 n.13. And, the contempt proceedings that follow the equity forms and that lead to the kinds of remedial orders in favor of the complainant that characterized equity have continuously been considered civil proceedings, and have never been equated with the criminal law or been deemed to be gov-

[1] *See* Pet. Br. 12-13. *See generally Green v. United States*, 356 U.S. 165, 198-99 (1958) (Black, J., dissenting from majority decision later overruled in *Bloom*) ("When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge, he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause").

erned by the constitutional criminal due process requirements.

c. Given the different levels of constitutional protections afforded to a defendant faced with these two forms of judicial authority, this Court has sought to mark a clear distinction between sanctions that *in substance* operate as civil contempt sanctions and those that *in substance* operate as criminal contempt sanctions.

The starting point has been recognition of the distinct natures and purposes of the two forms of sanction:

> If [the proceeding] is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive to vindicate the authority of the court. [*Hicks*, 485 U.S. at 631 (*quoting Gompers v. Bucks Stove*, 221 U.S. 418, 441 (1911))].

But, as *Hicks* explained, this Court has also recognized that this conceptual dichotomy, by itself, is too abstract and too indeterminate to be a rule of decision:

> In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order. [485 U.S. at 635.]

And, this Court has warned that:

> Although the purposes that lie behind particular kinds of relief are germane to understanding their character, this Court has never undertaken to psychoanalyze the subjective intent of a State's laws and its courts, not only because that effort would be unseemly and improper, but also because it would be misguided. In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both. [*Hicks*, 485 U.S. at 635].

For these reasons, this Court has formulated "a few straightforward rules," *Hicks*, 485 U.S. at 631—based on both the history and the logic of the situation—to determine whether a given sanction is properly classified as criminal or civil in its nature, and thereby to determine the procedural prerequisites to its imposition.

First, where the contempt sanction is unambiguously "to compensate the complainant for losses sustained" the sanction is unquestionably civil and remedial in nature. *United States v. Mine Workers*, 330 U.S. 258, 304 (1947).[2]

Second, where the contempt sanction is noncompensatory in nature and partakes of coercion to secure compliance with an order beneficial to a complainant as well as general deterrence and retribution to vindicate public authority, this Court has looked to the following test to determine whether the sanction should be classified as remedial (and thus civil) or punitive (and thus criminal) in its essential nature:

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[2] The opposing briefs repeatedly mischaracterize our position as being "that sanctions imposed for violation of a prohibitory order must be characterized as criminal contempt." Resp. Br. at 21; U.S. Br. 13. This is not our position. A court is free to proceed in civil contempt for violation of any order—be it prohibitory or mandatory—when the sanction is *compensatory*. Consequently, the opposing briefs' citations of cases in which the Court has authorized civil contempt sanctions to enforce prohibitory orders are beside the point: *Leman v. Krentler-Arnold Co.*, 284 U.S. 448 (1932) (reviewing a *compensatory* civil contempt sanction for defendant's violation of a prohibitory order); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949) (same). Similarly, *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 329 (1904), suggests only that *compensatory* civil contempt sanctions would be available against a defendant who violates a court order "to abstain from some action." The contempt sanctions at issue in the final case upon which the opposing briefs rely provide a mixture of compensatory relief and coercive relief in support of a mandatory order. *See Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986) (reviewing a civil contempt fine imposed to create a fund that provided direct benefits to the complainant class in order to ensure the defendant's compliance with a mandatory aspect of an order, but only until such compliance was achieved).

> The distinction between [contempts for] refusing to do an act commanded, —remedied by imprisonment [or coercive fine] until the party performs the required act; and [contempts for] doing an act forbidden, —punished by imprisonment for a definite term [or coercive fine]; is sound in principle, and generally, if not universally, affords a test by which to determine the [civil or criminal] character of the punishment. [*Hicks*, 485 U.S. at 632-33 (*quoting Gompers*, 221 U.S. at 443)].[3]

d. This mandatory/prohibitory dichotomy serves to distinguish sanctions that are structured in the uniquely remedial terms of traditional equity orders and sanctions structured in terms of the kind of deterrence of harmful conduct provided by traditional criminal sanctions.[4] By

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[3] The opposing briefs claim that we overread *Gompers* in light of its statement that its rule is "sound in principle" and "generally" affords the applicable test. But it was only prudent for the Court, in announcing a rule to govern future decisions, to frame that rule so that *principled* exceptions can be accommodated. (The most likely candidate for an exception to the general rule—that noncompensatory contempt sanctions supporting a prohibitory order are criminal—is the small subcategory of prohibitory orders whose violation can be "undo[ne]." *Hicks*, 485 U.S. at 633. For example, the violation of an order prohibiting defendant to build a house can be undone by an order requiring the defendants to tear the house down.) It is also very much to the point in this regard that neither respondent nor the government argues that the "scheduled" penalty/"unscheduled" penalty approach constitutes a principled exception to the *Gompers*' general rule. Nor could they, since their approach would abolish that rule.

The opposing briefs' restatement of their claim that *Mine Workers* rejected the *Gompers* approach is similarly unconvincing. We have already set out the pertinent part of the opinion in full at Pet. Br. 19-20, n.7 and explained why that passage is an illustration of the mandatory/prohibitory dichotomy, not a rejection of it. And, neither respondent nor the government do business with *Mine Workers*' text. See Resp. Br. 19-20, U.S. Br. 13-14.

[4] As we detailed in our opening brief, the English and early American equity practice was to issue orders that coerced discrete affirmative acts for the direct benefit of a complaint and that spent their force when the acts were done. *See* Pet. Br. 16 n.5. Such

so doing, this approach both grants the trial judge the flexible authority in civil cases that characterized equity *and* safeguards the Constitution's criminal due process protections against dilution. And, by providing an objective basis for determining which sanctions may be imposed through civil proceedings and which only through criminal proceedings, the distinction provides meaningful guidance to trial judges and to reviewing judges, without requiring the latter to engage in an inquiry into the subjective motivations of the former.[5]

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sanctions leave to the criminal law and to criminal contempt the deterrence of conduct harmful to the complainant and to the society.

And, as we also explained in our opening brief, the criminal law has historically been, and remains generally, a law of stated prohibitions against wrongful acts, enforced by the imposition of stated noncompensatory penalties (imprisonment, fine, or forfeiture). *See* Pet. Br. 22; *see also* W. LaFave, *Criminal Law* 183 (3d ed.); L. Frankel, *Criminal Omissions: A Legal Microcosm*, 11 Wayne L. Rev. 367 (1965); G. Hughes, *Criminal Omissions*, 67 Yale L.J. 590 (1958).

[5] Respondent asserts that the mandatory/prohibitory distinction "cannot be meaningfully applied" because of its "complete manipulability." Resp. Br. 26. But the distinction between acting and remaining passive is one of the basic distinctions we use to order our experience. The word "act" "[d]enotes external manifestation of [an] actor's will. . . . In its most general sense, this noun signifies something done voluntarily by a person." Black's Law Dictionary (5th ed. 1979). By the same token, the distinction between a command to act and a command to refrain from acting is generally accepted, and is one readily perceived in *most* situations. Indeed, the examples given by respondent to illustrate the "manipulability" of this distinction serve to rebut that characterization.

Respondent argues that a prohibition on illegal strike activities (*e.g.*, do not picket) can also be put in a mandatory language (*e.g.*, "comply with the laws and orders making the activities illegal"), and that "[a]n order directed against protestors blocking access to a clinic can be styled in mandatory terms—comply with trespass laws—or prohibitory terms—do not trespass." Resp. Br. 26. These manipulations are transparent: the essence of either direction to the defendant is clearly prohibitory. Finally, respondent argues that "an order concerning prison population can be phrased affirmatively—lower the population to 400 inmates—or in prohibitory terms—house no more than 400 inmates in the institution." Resp. Br. 26. But, the substance of either order is clearly mandatory, assuming that the prison population is currently more than 400. And, regardless of which wording is chosen, the defendant's obligations are limited to the performance of a discrete affirmative act.

2. Respondent and the government ask this Court to renounce the *Gompers/Hicks* framework, and to establish in its place a scheduled penalty/unscheduled penalty dichotomy as the test for distinguishing "coercive" civil contempt from criminal contempt. Under *this* dichotomy a contempt proceeding is civil contempt whenever the underlying court order (no matter how prohibitory the order may be) sets out a stated penalty (whether a determinate noncompensatory fine or prison term) in the event of a violation. In contrast, if a court issues an order against engaging in certain conduct and does *not* state the penalty, any such fine or prison term imposed on a defendant who violates that prohibition will be in criminal contempt. *See* Resp. Br. 14-15; U.S. Br. 11. On any commonly accepted standard of evaluation, this dichotomy fails.

a. The opposing briefs fail to cite a single instance in this Court's contempt law precedents in which the Court has articulated a "scheduled" penalty/"unscheduled" penalty distinction. The reason is clear; there is none.[6]

The only aspects of this Court's contempt jurisprudence that the opposing briefs invoke are general statements of the proposition that "remedial" contempt sanctions and "conditional" contempt sanctions are civil. *See e.g.*, Resp. Br. 13-18; U.S. Br. 9-11. The theory proposed is that a scheduled penalty is "remedial" because it is designed to "coerce" compliance with a court order, and is "conditional" because the defendant has " 'the power to avoid imposition of [the] fines' merely by complying with the court's outstanding orders." Resp. Br. 14 (*quoting*

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[6] Nor do the opposing briefs make any showing that the dichotomy they offer was embodied in the contempt jurisprudence of the equity courts of England. Once again, this is because no such showing is possible. *Compare* Pet. Br. 16-17 n.5.

Pet. App. 14a). This approach robs the terms "remedial" and "conditional" of all intelligible meaning.

(i) At the outset, we note that the opposing briefs treat as "remedial" all "coercive" and "conditional" sanctions that tend to induce compliance with an order that benefits another. A sanction is considered "coercive" if violation of the order is understood to prompt the sanction. And, all legal orders are so understood in virtually all legal regimes. Moreover, a sanction is considered "conditional" if the defendant has "the power to avoid imposition of [the sanction] by complying with the outstanding order[]." Again, legal orders generally are within that formulation in virtually all legal regimes. To be terms of distinction, "remedial," "coercive" and "conditional" simply must have more content than this. Indeed, it is the fact that it is all but impossible to conceive of legal sanctions that are not "remedial", "coercive", and "conditional" in a surface sense that has prompted this Court to look deeper in order to formulate more precise rules to distinguish the contempt sanctions that are *qualitatively* different in these terms from the sanctions associated with the traditional criminal law. *See* pp. 3-4, *supra*.

(ii) Nor do respondent or the government provide any basis for concluding that their understanding of "remedial" contempt orders and of "conditional" contempt orders entails the conclusion that their "scheduled" penalties/"unscheduled" penalties dichotomy is sound. After all, judicial orders are not mere precatory expressions of judicial preference. Rather, with or without explicit schedules of penalties, such orders are complete "conditional" legal commands backed by the clear understanding that a penalty will follow their violation, but will not follow if there is no violation. And, the purpose served by these threatened penalties is that of "coercing" compliance with the underlying order.

Equally to the point, there is no reason to believe that the purpose to vindicate public authority, which stands behind criminal contempt, is any less effectively or directly

served by judicial imposition of a "scheduled" penalty than than by imposition of an "unscheduled" penalty. Indeed, there are few ways in which a judge can make more clear that his authority will be vindicated at all costs, and that he will abide no trifling with his authority, than to make it unmistakably clear that any violations of his orders will be met with the most severe penalties. In whatever sense such scheduled penalties may be "remedial," it is not a sense that makes the penalties any less emphatically a means for vindicating the authority of the court.

(iii) What is clear is that, given the nature of our criminal law, the notion that "scheduled" penalties for the violation of a prohibition are uniquely "civil" turns matters upside down. The imposition of previously stated penalties for the violation of previously stated prohibitions is most certainly the historic province of the criminal law. Indeed, the law of crimes has been, and remains generally, a law of stated prohibitions against wrongful actions, coupled with stated noncompensatory penalties (imprisonment, fine, or forfeiture) for violations of these prohibitions. *See* pp. 5-6 n.4, *supra*; Pet. Br. 22. Against [illegible]is background not even Alice In Wonderland can be called on to justify the opposing briefs' novel use of the English language.[7]

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[7] The government's effort to bolster its position through a survey of this Court's cases that consider the line between "regulation" and "punishment" in contexts far afield from contempt proceedings (U.S. Br. 15-16) falls short of its mark.

None of the cited cases mentions—much less endorses—the "scheduled" penalty/"nonscheduled" penalty distinction for which the government argues.

And, while the government claims that these cases have set forth a broad "basic rule" that "burdens on . . . citizens" are not to be considered "punitive" if they are "rationally related to [a] nonpunitive objective," U.S. Br. 16, *Selective Service v. Minnesota Public Interest Res. Group*, 468 U.S. 841 (1984), suffices to show that the government's near limitless understanding of "nonpunitive objective" does not accord with the case law's more measured understanding of the term. *See id.*, at 851-52 ("[I]ntent to encourage compliance with the law does not establish that a [sanction] is

(iv) What is also clear is that the scheduled penalty/unscheduled penalty dichotomy offered by the opposing briefs leaves the constitutional interests that stand behind this Court's contempt jurisprudence at the trial judge's mercy. This dichotomy—as opposed to the mandatory/prohibitory dichotomy—truely turns on the form of words used in framing the order. And this is so, putting aside all questions of evasion and manipulation. The position offered in favor of the scheduled penalty approach is, in essence, that each judge is, and should be, free in each case to enter any prohibitory order and to impose any contempt fine or prison sentence for a violation, without regard to the constitutionally prescribed criminal procedures, so long as he appends to his order a schedule of maximum penalties.

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merely the legitimate regulation of conduct. Punishment is not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct."). *See also Bell v. Wolfish*, 441 U.S. 520, 537 (1979) ("traditional aims of punishment [include] deterrence").

More generally, a reading of the cited cases makes it plain that the issues being considered in each are conceptually distinct from the others, and from the issues presented by this case. As this Court has recognized, the imposition by a court of a noncompensatory fine for violating the court's order has, by its nature, both punitive and remedial elements. The question posed here is how to determine which element predominates. In cases such as *Bell v. Wolfish*, in contrast, it is perfectly possible to view the challenged government action—there "double bunking" of pretrial detainees rather than "single bunking"—as a practical response to a practical problem that is not motivated by any desire to harm those affected in retribution for any wrong they have committed or to deter such wrongful conduct in the future. Indeed, that is the way the *Bell v. Wolfish* Court did look at the government action there.

It is intuitively obvious that the differences between *Bell v. Wolfish* and this case outweigh the similarities and that the determination of whether a contempt order is punitive or remedial calls for a method of inquiry that takes those differences into account. It is undoubtedly for this reason that *Hicks*, which was decided after all the cases the government invokes, nevertheless treats the traditional law of contempt, previously elaborated by this Court—and not some more general law of punishments in the abstract—as the touchstone.

This Court has emphasized that the contempt power is a power that "is liable to abuse." *Bloom*, 391 U.S. at 202. The scheduled fine approach subverts the "protection against the arbitrary exercise of . . . th[is] summary power," *id.*, provided by the Constitution's criminal due process provisions.[8]

B. *The Full Civil Settlement.* It is our submission that under *Gompers*, and under the reasoning of this Court's post-*Gompers* cases, a civil contempt sanction, as a sanction imposed in a civil proceeding to further the remedial interests of a civil complainant, by *its nature ends with the full relinquishment through settlement of all the underlying remedial interests of that civil litigant.* The Virginia Supreme Court's decision—empowering courts to take over fully settled civil contempt cases for independent prosecution by court-appointed officers—is in the plainest conflict with these decisions of this Court. *See generally* Pet. Br. 25-37. This conflict constitutes a compelling and entirely independent basis for reversal of the decision below.

1. The principal argument in the opposing briefs is that no federal question is even raised by the state practice at issue here because a state may adopt its own rules of mootness, which need not accord the same significance to civil settlements as is accorded by the federal law of mootness. It is emphasized in this regard that Article III (on which the federal law of mootness rests) has no

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[8] The government responds that a defendant can always appeal if actual judicial bias can be shown. U.S. Br. 17. But review for actual bias proceeds, as it must, under a very deferential standard in which a strong presumption of neutrality and good faith prevails. *See Withrow v. Larkin*, 421 U.S. 35, 55 (1975). That being so appellate review for actual bias has never been deemed an adequate alternative to the fundamental safeguards of criminal procedure that the Constitution provides in cases which are in fact criminal. And, it has been precisely in order to avoid an "unseemly", "improper", and "misguided" process of case-by-case policing of judicial motives that this Court has formulated the rules stated in *Gompers* and *Hicks* on which we rely. *See Hicks*, 485 U.S. at 635.

application to the states. *See* Resp. Br. 28-32; U.S. Br. 22-25.

As we have previously stated in response to the same argument, we do not advocate applying the federal law of mootness to the states, but *only* this Court's law of constitutional due process and the distinction between criminal and civil contempt that forms the base for that law in this context. *See* Pet. Reply Br. (on petition) 6-7.

This Court has been unmistakably clear that, in passing on state contempt proceedings, "the characterization of [a] proceeding and the relief given as civil or criminal in nature, for purposes of determining the proper applicability of federal constitutional protections, raises a question of federal law rather than state law." *Hicks*, 485 U.S. at 630.

This Court has also consistently and repeatedly emphasized that the characterization of a contempt order as civil in nature or criminal in nature for constitutional purposes turns on whether the order can be more properly characterized as *"remedial, for the benefit of the [civil] complainant"* (and therefore civil) or *"punitive, to vindicate the authority of the court"* (and therefore criminal). *Hicks*, 485 U.S. at 631 (*quoting Gompers*, 221 U.S. at 441) (emphasis added).

And, this Court has also long made clear that "[w]here a judgment of contempt is embodied in a single order which contains an admixture of criminal and civil elements, the criminal aspect of the order fixes its character. . . ." *Penfield Co. v. SEC*, 330 U.S. 585, 591 (1947); *see Hicks*, 485 U.S. at 638.

The sum of these *federal due process principles* is that a state is *not* at liberty to include in a contempt order generated by *purely civil proceedings* any provision which renders a civil defendant subject to sanctions that bear *no relation* to the remedial interests of the civil complainant, and that instead operate *solely* to vindicate the authority of the court.

Nonetheless, the Virginia court held that a trial judge may, at his discretion, include in a contempt order that was generated by purely civil proceedings a rule that operates *solely* for the court's vindication, and that relates not at all *to any remedial interests: viz.*, the rule that contempt sanctions continue to operate against a defendant, even after the complainant's full relinquishment of all remedial interests in the order, so that the judge may ensure that his public authority is vindicated. Petitioners—who never received the criminal procedure protections that the Constitution affords to criminal contempt defendants—thus face a purely punitive (and therefore criminal) sanction. The Virginia law in this regard violates petitioners' constitutional due process rights.[9]

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[9] In all of the opposing briefs, the only attempt to justify the rule of the court below in terms of any purpose other than the vindication of the public authority of the courts appears in one brief paragraph in the government's brief, which argues that the rule below should be understood as merely an effort to treat the state entities that would receive the fines and "were affected by petitioners violations of the injunction . . . as though they were parties to the case." U.S. Br. 24. This argument—which has never been urged by respondent—fails on its own terms:

First, this rationale played *no role whatsoever* in the decision or judgment of the Virginia Supreme Court, which instead explicitly rested the rule in question on the public interest in vindicating the authority of the courts. *See* Pet. App. 17a.

Second, the rule in question does not treat the state entities "as though they were parties to the case." The fines at issue were assessed without any evidence of or reference to the views of these entities or the specific costs these entities incurred. None of these entities ever intervened in these proceedings, and none ever sought or defended these fines. Indeed, the two counties at issue expressly notified the trial court that they *had no objection to the vacating of the fines.* J.A. 48-49, 54.

Finally, in refusing to vacate these fines, the trial judge made clear that he viewed the matter as one involving the court's interests and prerogatives, and the court's role in vindicating public justice, and was thus a matter subject to *his* discretion, rather than one involving the *rights* of the counties or of any other state entity. J.A. 37, 54-56, 60.

Against all this, respondent repeatedly asserts that *Gompers*' holding with respect to the effect of a full settlement of the underlying civil case on outstanding civil contempt sanctions is no more than a narrow federal mootness decision. Although we have already discussed this point at length, it is worth highlighting once again the inseparable relationship between *Gompers*' discussion of the constitutional distinction between civil and criminal contempt and *Gompers*' holding regarding the effect of a full civil settlement on civil contempt sanctions ancillary to that settled civil case.

First, Gompers recognizes that the distinctions between civil and criminal contempts "involve [the] substantive rights and constitutional privileges" of a defendant. 221 U.S. at 444. This being so, a contempt sanction that operates as a criminal sanction may be "properly imposed only in a proceeding instituted and tried as criminal contempt," in a manner consistent with constitutional criminal due process. *Id.*

Second, Gompers understands civil contempt as an ancillary proceeding to an underlying civil action designed to vindicate the rights of the civil complainant. *See* 221 U.S. at 441. As such, "[t]here is nothing in the nature of a criminal suit or judgement imposed for public purposes" about it. *Id.* at 445. It is for that reason that constitutional criminal procedures are not required.

Third, Gompers reasons that since the legitimacy of a civil contempt proceeding depends on its remedial nature —as a part of the underlying civil action—the civil contempt complainant is "not only the nominal, but the actual party on the one side, with the defendants on the other," and the complainant must be treated as acting "in its own right in an equity cause, and not as a representative of the [government or the court] prosecuting a case of criminal contempt." *Id.* at 445.

And, finally, Gompers drew the lesson from the foregoing that, precisely because the remedial interests of the

complainant that justify civil contempt expire with a full settlement of the underlying civil dispute between the complainant and the defendant, at that "juncture the complainant does "not requir[e], and . . . [is] not entitled to any compensation or relief of any other character." 221 U.S. at 451-452.

It is for that reason that the force of any civil contempt sanction obtained by a complainant "necessarily end[s] with the settlement of the main cause of which it was a part." 221 U.S. at 452. The *Gompers* opinion, then, provides a constitutional due process rationale for this rule—which assures that criminal contempt sanctions cannot be imposed without criminal procedures—and *not* a "narrow [federal] mootness rationale." [10]

2. Respondent next argues that, even if *Gompers* cannot be understood as a federal mootness case, its rule should have no application to this case, since the civil contempt sanction in *Gompers* was "compensatory" and the sanction here is "coercive." In essence, respondent argues that "coercive" civil contempt sanctions—unlike "compensatory" sanctions—need not be focused on serving the remedial interests of the complainant. *See* Resp. Br.

[10] Although the United States' brief claims that this Court has "repeated[ly]" described *Gompers* as based on a "narrow mootness rationale" (U.S. Br. 23), there is no decision of this Court that so states. The three decisions cited by the government, in the course of making a passing reference to *Gompers*, use the word "moot" to describe the effect of settlement on an outstanding civil contempt judgment. *See id.* (citing cases). As shorthand, that summation of the *Gompers* rule is fair enough. But, there is nothing in any of these decisions that so much as suggests that the Court had the larger purpose of using the term to redefine the *Gompers* rule as one that rests on "narrow" federal procedural considerations rather than on the fundamentally distinct natures of civil contempt and criminal contempt. Indeed, the full discussion of *Gompers*' holding and rationale in *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 452-53 (1932) makes it clear that the *Leman* Court read *Gompers* in the latter way. And as this Court has repeatedly emphasized, the distinct natures of civil and criminal contempts have constitutional significance. *See* pp. 1-5, 12, 14, *supra*; *Hicks*, 485 U.S. at 630; Pet. Br. 28-31.

33-36. But, in *Gompers*, and in numerous subsequent cases, this Court has emphasized that civil contempt sanctions—whether "compensatory" or "coercive" in nature—are legitimate only *when the sanctions further remedial purposes, for the benefit of the civil complainant.*[11]

Indeed, far from retreating from this understanding, subsequent cases of this Court have clearly applied it. *Shillitani v. United States*, 384 U.S. 368, 371-372 (1966), involved a coercive civil contempt sentence of imprisonment (in that case, a determinate sentence with a purge clause) for refusing to testify before a grand jury. The *Shillitani* Court held that the sentence must be terminated —even though the judgment of sentence *had* been issued, the full sentence had *not* been served, and the defendant had *not* complied with the order—when, as a result of a subsequent event (the end of the grand jury), continued enforcement of the sanction would no longer serve the remedial purposes that justified the civil sentence. *Id.* ("[o]nce the grand jury ceases to function, the rationale for civil contempt vanishes"). This holding controls the present case.

[11] *Gompers* discusses at length the paradigm of the coercive civil sanction, the civil prison sentence, and, in so doing, *Gompers* could not be more clear that in this—as in any—civil contempt context the defendant's noncompliance with the court's order "is treated as being . . . in resistance to the opposite party [rather] than in contempt of the court." 221 U.S. at 442. And the sanction is "not to vindicate the authority of the law, but is remedial . . . *for the benefit of the complainant.*" *Id.* (emphasis added). The cases subsequent to *Gompers* have hewed to this understanding of "coercive" civil contempt. *See, e.g., Hicks*, 485 U.S. at 631; *Shillitani*, 384 U.S. at 371-372; *Penfield v. SEC*, 330 U.S. at 590.

Respondent and the government rely on a quote from *Mine Workers* which states that various rules regarding "compensatory" civil sanctions do not apply to "coercive" civil sanctions because "where the purpose is to make the defendant comply, the court's discretion is otherwise exercised." *See* Resp. Br. 33; U.S. Br. 24. But this passage begins a discussion of how a court may set *the amount* of a civil or criminal "coercive" contempt fine and concludes that the court need not follow a compensatory rationale. *See* 330 U.S. at 304-305. The opinion at no point implies that a "coercive" *civil* fine can validly operate in a manner unrelated to the remedial purposes which justify the civil proceeding.

3. In a variation on a theme first heard in *Shillitani*, respondent seeks refuge in the proposition that the civil or criminal nature of a contempt sanction should be determined "at the time the prospective sanction is announced" so that civil fines, "legitimate when made," are not "transmogrified into criminal sanctions" by "later occurring events over which the court has no control (such as . . . settlement)." Resp. Br. 34.

In *Shillitani*, the respondent argued for the continued enforcement of the civil sentences of imprisonment after their remedial purposes had expired, raising the same objection that respondent raises here: that the sentences were valid civil sanctions when issued, and "the length of imprisonment [should not] depend[] upon fortuitous circumstances, such as the life of the grand jury and when a witness appears." 384 U.S. at 372. This Court rejected that argument and held that a civil sanction could not extend beyond its justifying remedial need:

> Having sought to deal only with civil contempt, the District Courts lacked authority to imprison petitioners for a period longer than the grand jury . . . . Once the grand jury ceases to function, the rationale for civil contempt vanishes. [*Id.* at 371-372.]

Indeed, this Court declared that such an "objection . . . has no relevance to the [civil contempt] situation," and "would apply only to unconditional imprisonment for punitive purposes." *Id.*[12]

[12] As *Shillitani* demonstrates, the central issue here is *not* whether a court's legitimate prior actions are "transformed" into illegitimate actions by the passage of time and the actions of others. Rather, it is whether civil contempt sanctions may, at the judge's discretion, continue to operate against a defendant even after the remedial interests the sanctions were designed to serve are entirely spent, and even when the *only* purpose served by their continued operation is to punish the defendant in order to vindicate the court's authority. Viewed in that frame, such a rule of contempt sanctions—whether judged when it is announced or when enforced against a defendant—cannot be reconciled with this Court's civil contempt jurisprudence.

4. At this point, respondent recognizes what he so steadfastly denied in his discussion of the mandatory/prohibitory dichotomy: *viz.*, that virtually all contempt sanctions "inevitably" serve the mixed purposes of remedying a complainant's injury and of vindicating the court's authority. Resp. Br. 35. That being so, says respondent, the fact that the Virginia "survivability" rule serves to vindicate the court's authority is not fatal. This trivializes what this Court has said.

This Court, in recognizing that contempt sanctions often have "incidental effects" that intermix remedial and punitive purposes and effects, has required deeper analysis to determine whether the operation of a particular sanction is properly characterized as civil or criminal. And, on that analysis, a rule providing that outstanding "civil" contempt sanctions continue after *all* remedial justifications are spent, is one that cannot be classified as civil.[13]

[13] The United States argues that civil contempt orders can *solely* "serve[] to vindicate the court's authority." U.S. Br. 25. But none of the cases cited by the government are to that effect.

First, the government argues that a civil contempt need not "benefit a private complainant," but may instead benefit "the public at large or the government as their representative." *Id.* But each of the cases cited by the government involved the government *as a civil litigant*, and emphasized that the contempts were civil *only* because the government interests being vindicated were those of a civil litigant, and were *not* related to the general "vindication of public justice." *See McCrone v. United States*, 307 U.S. 61, 63-65 (1939); *Mine Workers*, 330 U.S. at 302.

Second, the government argues that vindication of a court's authority through civil sanction is common when "courts . . . impose civil sanctions on litigants who abuse their processes." U.S. Br. 25. But each case cited involves sanctions that unambiguously operate in a remedial manner—serving directly to benefit the civil litigant injured by the wrongful conduct—and bear no resemblance at all to traditional criminal fines. *See NHL v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) (dismissal of civil suit with prejudice as sanction for discovery abuses); *Chambers v. NASCO*, 111 S. Ct. 2123 (1991) (award of other side's attorneys' fees as sanction for abuse of proceedings); *McComb v. Jacksonville Paper Co., supra*, 336 U.S. at 194-195 (award of backpay on expedited basis in response to employer's refusal to cooperate in backpay proceeding).

5. As a last resort, respondent embraces the rationale of the decision below: "To remove from a state court the power to collect coercive civil sanctions after settlement of the underlying dispute, would utterly eviscerate the efficacy of civil contempt sanctions . . . [leaving contemnors] "above the law" . . . [and with] every incentive to flout [a] court's orders." Resp. Br. 36-37 (internal cite omitted). *Compare* Pet. App. 17a.

This is unadulterated hyperbole. Even if one ignores for the moment the availability of criminal contempt sanctions to vindicate the court's authority—as respondent and the court below would do—the pressures brought to bear on a defendant by the imposition of severe civil sanctions are substantial.[14]

But the ultimate refutation of this alarmist argument is that *criminal contempt sanctions are at any—and every—point very much available to a court faced with contempt, regardless of any private settlements. See Gompers*, 221 U.S. at 451-52. And it is this Court's clear jurisprudence that it is the office of *criminal* contempt—*not* civil contempt—to vindicate the public's interest in the authority of the courts.

C. *The Sum of the Matter.* In the end, all respondent's arguments come down to the refrain that the dignity of the law and the authority of the courts are jeopardized by criminal contempt procedures. This is an unworthy argument that this Court has squarely rejected:

> We cannot say that the need to further respect for judges and courts is entitled to more consideration

[14] A complainant may, after all, proceed quite differently from the complainants below and aggressively seek to collect civil contempt fines promptly—whether compensatory or coercive—in order to maximize that pressure. And, of course, a complainant may choose not to settle the underlying dispute on any terms other than those that fully vindicate all of its remedial rights and interests as the complainant has defined those rights and interests. The notion that in the face of such forces a contemnor has "every incentive to flout [a] court's order" has nothing to do with reality.

> that the interest of the individual not be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries. [*Bloom*, 391 U.S. at 208.]

In this case, this argument should be rejected once again.[15]

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

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[15] We demonstrated in our opening brief that, in evaluating the claims that the $52 million in civil contempt fines imposed upon them violates the Excessive Fines Clause and the Due Process Clause, the Virginia Supreme Court failed to address the former claim on the ground—subsequently shown to be erroneous—that the federal constitutional limits on excessive fines do not govern civil contempt fines, *see Austin v. United States*, 113 S. Ct. 2801 (1993), and dismissed the latter claim with a refusal to perform the constitutional analysis required by this Court's precedents, *see TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993).

It suffices to add two points. First, contrary to respondent, this Courts' analysis of the constitutional limits on punitive damages awards in tort cases is applicable here. Accepting respondents theory that these fines are coercive civil contempt fines, the fines most assuredly serve the same function as punitive damages in our civil system—to deter identified wrongful behavior that also might, but need not, rise to the level of criminal conduct. Second, both respondent and the government attempt to fill in for the Virginia court by locating record citations that might support that court's ultimate legal conclusion. But, particularly in light of the approach this Court took in *Austin*, the application of the proper constitutional test is surely a matter for the Virginia court in the first instance. Thus, if necessary in light of the disposition of the first two questions presented, this case should be remanded for reconsideration by the court below.

Respectfully submitted,

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